IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6902

LONNIE GOODING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

I.

INTRODUCTION

The government's brief raises several collateral issues which we believe are not directed to the heart of the issues before this Court.[1] Moreover, the government

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[1] The best illustration is the government's suggestion, made for the first time in this litigation, that the search, at 9:30 P.M., was not made at night. Thus, the government in effect maintains that the issues fully litigated and decided below and then submitted to this Court for resolution are not presented by the instant case. We demonstrate, *infra*, that the government's belated contention is without merit.

often mischaracterizes petitioner's position in an attempt to diffuse our arguments.

It is petitioner's position that there are only two possible statutes under which this federal narcotics search warrant could have been applied for and directed to the District of Columbia police: 21 U.S.C. §879(a) and 23 D.C. Code §§521-523. Under either statute, a special showing of necessity for nighttime execution must be made; however, such showing was not made in this case.

Section 879(a) could be held to apply because it is the U.S. Code narcotics search warrant provision, and the search in this case was for evidence of violation of the federal narcotics laws. If the search had been made by agents of the Bureau of Narcotics and Dangerous Drugs, there would be no question that §879(a) was the applicable statute. The instant search, however, was made solely by the District of Columbia police, and this fact may require the conclusion that the validity of the warrant must be tested under the general provisions in the District of Columbia Code, 23 D.C. Code §§521-523, governing nighttime searches by District police.

The government contends that the warrant here should be tested and validated under 33 D.C. Code §414.[2] However, §414 is a part of the Uniform Narcotic Drug Act[3] and has application only to searches for violations of that act. The procedures of §414 have no application to warrants for violations of the *federal* narcotics laws.

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[2] We dispute, *infra*, the government's contention that the requirements of §33-414 were satisfied. The more fundamental point, however, is that §33-414 simply has no application to the *federal* narcotics warrant at issue in this case.

[3] 33 D.C. Code §§401 *et seq.*

This is precisely what each judge below concluded on this issue (App. 29, n. 14; 40-41; 45-46).

To review: petitioner contends that, if Section 879(a) is controlling, the Court should hold that Congress introduced in 1970 a requirement of "exigent circumstances" for nighttime execution—a requirement which was not satisfied in this case. We contend alternatively that 23 D.C. Code §§521-523 are the statutory provisions governing this search, and it is conceded that the requirements of these sections were not met.[4]

II.

REPLY TO COLLATERAL ISSUES RAISED BY THE GOVERNMENT

A. This Search Made at 9:30 P.M.—Almost Four Hours After Sunset—Took Place at Night

For the first time in this lengthy litigation, the government asserts that this search (which occurred at 9:30 p.m.—almost four hours after sunset) did not occur at night (Res. Br. 19-23). This argument must fail because the common law definition of day and night applied at the time the possibly applicable search warrant statutes were promulgated,[5] and there is not a shred of statutory language nor legislative history to suggest that Congress intended to supplant the several hundred year old common law rule (sunrise-sunset) with one predicated on defining "nighttime" in terms of a specific span of hours without regard to whether light or darkness exists at the time of the search.

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[4] App. 30 & n. 15.

[5] Title 21 U.S.C. §879(a) uses the term "at any time of the day or night." Title 23 D.C. Code §521(f)(5) uses "hours of daylight" and "at any time of the day or night."

The fact that Rule 41(h) redefined daytime and nighttime for Rule 41 purposes some two years after the 1970 legislation in issue was enacted in no way supports the government's argument;[6] while the legislative history of both the Controlled Substances Act and the D.C. Court Reform Act does not expressly state that Congress intended the common law rule to be applied, it is reasonable to impute to Congress an intention to embrace the definitions of "day" and "night" then being applied by the federal courts.[7] Under even the most restrictive of the common law definitions of night, the search in this case–almost four hours after sunset–was a nighttime search. *Cf., Jones v. United States,* 357 U.S. 493 (1958).

Nowhere in its brief does the government cite a federal case by which night and day are differentiated by use of a specific span of hours such as utilized in Rule 41(h) (effective October 1, 1972). Instead it cites three cases on page 21 of its brief which are samples of the continuing controversy extending over hundreds of years as to whether day and night for purposes of search warrants are separated (1) by sunset and sunrise or (2) by the onset of such darkness that the features of a man's face or the words on the warrant cannot be seen or read by the existing natural light. That controversy does not

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[6] Judge Fahy noted that the redefinition of night contained in revised Rule 41(h) "remains for consideration with respect to search warrants issued after its effective date [October 1, 1972]." App. 42

[7] Distefano v. United States, 58 F.2d 963, 964 (5th Cir. 1932) (service of a daytime warrant more than one hour after sunset invalidates the search and requires suppression of the evidence); United States v. Martin, 33 F.2d 639 (D. Mass. 1929) (service ten minutes after sunset voids the search and requires suppression of the evidence). See also, 79 C.J.S., Searches and Seizures §83(c)(2).

affect the search in issue here which was clearly made in the nighttime.[8]

B. Title 33 D.C. Code §414 Has No Application To and Cannot Validate the Federal Narcotics Search Warrant in Issue Here; Moreover, the Procedural Requirements of Section 414 Were Not Satisfied by the Magistrate Here.

We argued in our main brief to this Court that the "D.C. Code's Uniform Narcotic Drug Act (33 D.C. Code §§401-425) plays no part here." (Pet. Br. 32, n. 45). We adhere to that position because this was a search for suspected violations of federal (U.S. Code) narcotics law; indeed, all three judges below separately concurred on this point (App. 29, n. 14; 40-41; 45-46). Alternatively, if 33 D.C. Code §414 does furnish the governing statutory procedure for this warrant, then the warrant is invalid because the magistrate (a) was not aware that §414 was the governing standard and did not make the probable cause findings required by that statute and (b) did not adhere to the prescribed procedures of §414. Indeed, the Court of Appeals held:

> "There is no showing that this requirement was met in these cases, so we will proceed on the assumption that §414 would not validate the search warrants challenged here." App. 27; see also, App. 41; 46, n. 3.

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[8] At pages 22-23, the government adverts to the New York Criminal Procedure Law which Congress was told was a model used in the drafting of §§521-523. Even assuming that the definition of day and night in the New York law could be read into §§521-523, that law defines daytime as from 6:00 a.m. to 9:00 p.m. (N.Y.C.P.L. §§690.30 & 690.35 (1971)). The search in issue here took place at 9:30 p.m.

1. *This Warrant Was Applied For And Issued Pursuant To Federal Narcotics Law; 33 D.C. Code §414 Has No Application To Such Warrants.*

The government asks this Court to transform a warrant which was issued for violations of the federal narcotics laws (26 U.S.C. §4704 (1964)) into a warrant for violations of the D.C. Code narcotics laws. Here the magistrate made findings that he had probable cause to believe violations of the United States Code were taking place. These findings cannot be transformed after the fact into findings that violations of the D.C. Code were occurring. *Cf., Thomas v. United States,* 376 F.2d 564, 567 (5th Cir. 1967).

It is axiomatic that in reviewing the establishment of probable cause, the government must stand or fall on the evidence and documents presented to the magistrate. *Aguilar v. Texas,* 378 U.S. 108, 109, n. 1 (1964). After-the-fact justifications and changes in evidentiary facts are not permitted. Here every document presented to the magistrate indicated that the police officer and prosecuting attorney believed that violations of 26 U.S.C. §4704(a) were occurring (App. 5, 6, 8, 9). After reviewing the affidavits and application, Magistrate Margolis independently determined that there was probable cause to believe that violations of 26 U.S.C. §4704(a) were occurring, and accordingly he issued a federal search warrant (App. 9-10).

At this stage of the proceeding, it is improper to make a finding that the warrant was in fact issued for alleged violations of the D.C. Code narcotics laws. That question was not presented to the magistrate, and he made no finding of probable cause that Mr. Gooding was violating

the D.C. Code;[9] the sole focus of the attention of all parties was upon the federal narcotics provisions and all judicial findings were predicted thereon. The government cites no case to support the retroactive transformation of a federal search warrant into a local search warrant.

As we have shown, the warrant here was the result of an investigation for violations of the federal narcotics laws; all portions of the application–including that signed by a prosecutor (App. 5)–reflected the suspicion that violations of federal law were taking place. Moreover, because D.C. police Officer Green developed evidence that Mr. Gooding was selling narcotics and had a record of narcotic violations (App. 8-9), the appropriate procedure was to apply for a federal warrant for violations of federal law.[10]

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[9]The government cites United States v. Averell, 296 F.Supp. 1004 (E.D.N.Y. 1969), and Ray v. United States, 10 F.2d 359 (6th Cir. 1926), in support of its argument that this warrant can be retroactively transformed from a federal warrant into a D.C. Code warrant. Those cases sustained warrants which were issued with no statutory citation thereon or with an inadvertent citation of the wrong statute. Neither of these situations is the case here. Here, the application documents and the warrant itself referred to the statute which all participants intended at the time to govern this search (26 U.S.C. §4704). They did not have the slightest intention to enforce the D.C. Code provisions with this warrant. It is only because the validity of this warrant for nighttime execution is under challenge here that government lawyers are seeking to read more into the four corners of the warrant papers than is there. The warrant can be sustained only if it satisfies the standards of 21 U.S.C. §879(a) or 23 D.C. Code §§521-523 (See Section I supra.).

[10]Testimony before Congress further indicates that the instant warrant was applied for, considered, and issued as a federal (U.S. Code) warrant. United States Attorney David G. Bress told the Senate District of Columbia Committee:

> "Minor narcotic offenders in this jurisdiction are generally dealt with as misdemeanor violators in the court of general sessions [under 33 D.C. Code §§401 *et seq.*]
>
> * * * * *
>
> "... all sellers of heroin or related drugs ... are prosecuted

Thus, as the search warrant documents reflect, all parties to the issuance of this warrant—affiant, prosecutor, and magistrate—in accordance with prosecutorial procedure viewed this search warrant as issued under and governed by federal procedure; there is no shred of documentary or other evidence suggesting that any participant had any intention of this warrant being issued under or governed by 33 D.C. Code §414. Thus, this was a federal warrant, and §33-414 is not available to sustain it.

2. *If 33 D.C. Code §414 Is Controlling Here, The Warrant Cannot Be Sustained Because The Statutory Procedures Of §414 Were Not Followed.*

The warrant in issue here was prepared using a form provided by the Administrative Office of U.S. Courts.[11] This form was designed for use with then Rule 41 of the Federal Rules of Criminal Procedure. Thus, to the extent that Rule 41 differed from §33-414, the pre-printed language on this form would not be in conformance with the D.C. Code. A comparison of the operative sections of the two provisions reveals the different procedures required:

Rule 41(c) (1971):

"A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing

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under the appropriate Federal statute."

Hearings before the Committee on the District of Columbia, United States Senate, on S.2869, S.2602, and S.2980 (Part 2), 91st Cong., 1st Sess. 369, 370 (1969).

[11]Form A.O. 93 (Revised June 1964) (see original District Court record).

the grounds for issuing the warrant."

33 D.C. Code §414:

"(b) A search warrant cannot be issued but upon probable cause supported by affidavit particularly describing the property and the place to be searched.

"(c) The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

It is quite evident that the procedural requirements of §33-414 are more stringent than those of Rule 41. The warrant (App. 10-11) tracks Rule 41; it does not follow the language or the requisites of D.C. Code §33-414, and therefore the warrant is not a valid warrant under the D.C. Code. We argued this point to the Court of Appeals, and all three judges adopted it (App. 27; 29, n. 14; 41; 45-46).

Finally, the plain language of the warrant fails to make a finding mandated by §414(a). As Judge Robinson highlighted in his opinion (App. 46, n. 3), that section requires the magistrate to find probable cause to believe that narcotics are being possessed "in violation of the provisions of this chapter." Since the UNA does contain provisions authorizing certain uses and possession of narcotics, an essential element of probable cause is the suspect's not being licensed or authorized under Title 33 to possess the heroin. That finding is not made in this warrant, and, as indicated in §414(a), it is essential.

III.

THE GOVERNMENT HAS FAILED TO REPUDIATE PETITIONER'S ARGUMENT THAT SECTION 879(a) REQUIRES A FINDING OF EXIGENT CIRCUMSTANCES FOR NIGHTTIME SEARCHES.

As we indicated in the Introduction to this brief, the government's brief expresses misunderstanding of our position. For example, at pages 17 and 44 of its brief, the government states that our "principal claim is that section 879(a) is not applicable here at all." That is incorrect.

In our main brief, we made two independent, alternative arguments. The first was that assuming the applicability of 21 U.S.C. §879(a), the requirements of that section were not met. The other presumed that the controlling provisions in this case were found to be 23 D.C. Code §§521-523. Title 23 is a comprehensive set of rules for D.C. police searches not covered by other special provisions of the District of Columbia Code.

We stand on these contentions equally. If the Court determines either in petitioner's favor, it follows that the search was unlawful because the warrant in issue does not comply with the commands of either statutory provision. We find it unnecessary to reargue these contentions in this reply brief.

We note, however, that the government concedes—albeit in a conditioned fashion—that the plain language of section 879(a) requires a special showing for a nighttime search (Res. Br. 16, 36). The government represses the fact that this language was enacted—not "in a vacuum"—but as part of thoroughly considered legislation (Pet. Br. 18-28). Indeed, the very language which is at issue here was drafted by the Department of Justice.[12] We repeat what we said at page 25 of our main brief:

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[12]Indeed, the provisions of §879(a) and of §§23-521-523 were submitted to Congress and sponsored by the Department of Justice.

> "We submit that if the Department of Justice and the Congress had intended the test set forth in §1405 to continue in force as to all controlled substances, the language of §1405(1) would have been transferred intact into the new comprehensive act. This was clearly not done."

As we indicated in our main brief, we embrace fully Judge Robinson's view that section 879(a) creates an "exigent circumstances" test (Pet. Br. 26-28). We disagree with the government's statement at page 36 of its brief that petitioner and Judge Robinson are unable to agree on the meaning of section 879(a).[13] Our sole disagreement with Judge Robinson's opinion is in the application of the "exigent circumstances" standard to the warrant in issue as set forth at pages 28-31 of petitioner's main brief.[14]

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[13]On page 38 of its brief, the government quotes certain portions of Judge Robinson's opinion which if left unexplained could confuse this Court as to our position in this Court. In the Court of Appeals, we argued that because this search took place in the District of Columbia and was executed by District of Columbia police, section 879(a) should embrace the criteria of 23 D.C. Code §§521-523 for the issuance of federal narcotics search warrants. Petitioner has not advanced that argument in this Court (Pet. Br. 25-28). Our position is that the language of §879(a) creates an "exigent circumstances" test for nighttime warrants as explicated by Judge Robinson below.

[14]As a fall-back position, the government argues that if section 879(a) does not require particularized findings of exigent circumstances for nighttime search warrants, the warrant in issue nonetheless satisfies that test. (Res. Br. 39-40). We note that the government is ignoring the concession that it made to the Court of Appeals as to whether the warrant in issue satisfied §879(a)—"We do not contend that any such particularized showing was made in this case." (Gov't. Reply Br. 2, n.5). Moreover, the government's sole support for its fall-back position is the quotation without elaboration of Judge Robinson's statements on this matter.

IV.

THE EXCLUSIONARY RULE SHOULD BE APPLIED HERE TO ENFORCE THE INTENT OF CONGRESS AND TO PREVENT EVIDENCE WHICH HAS BEEN UNLAWFULLY SEIZED FROM TAINTING THE PURITY OF OUR JUDICIAL PROCESS.

A. Introduction

In Section II of its brief, the government argues that even if the warrant is invalid—which we believe it is—the evidence should not be suppressed because the warrant was applied for in good faith and because "there is a defect in procedure resulting from an error of judgment on the part of the magistrate. . . ." (Res. Br. 54). This facile and seemingly simple assertion cannot survive analysis; this Court should not condone searches performed under the authority of invalid warrants.

Analysis of the government's argument reveals its misinterpretation of the *Weeks* rationale. First, adoption of its position would negate the need to obtain a valid warrant because any defect would be explained away as a "defect in procedure resulting from an error of judgment." Such a result would impair and undermine numerous precedents requiring findings of probable cause by a neutral magistrate for each essential constitutional and statutory requisite.

The second flaw is (a) that no branch of the government would vigorously enforce the constitutional and statutory rights of the citizens and (b) that the purity of our trial justice would be tainted by permitting the government to use illegally seized evidence to convict citizens. The government ignores one of the clear holdings of *Weeks v. United States*, 232 U.S. 383 (1914): that the federal courts are not to be parties to the subversion of the public's constitutional rights by permitting tainted evidence in their courtrooms.

B. The Government's Position Would Nullify The Procedures Established By Congress.

At several places in its brief (*e.g.*, 29, n. 14; 56), the government intimates that the warrant meets the Fourth Amendment standards even though it might not meet certain statutory standards. This suggests that fundamental errors in following statutory procedure do not mandate suppression whereas fundamental errors in applying the Fourth Amendment will invoke the *Weeks* rule. In other words, violating statutory procedures should produce either no consequences or less severe consequences than deviations from Fourth Amendment requirements.

It is our position that statutory procedures are on the same footing as Constitutional procedures. A fundamental error in the application of either invalidates the warrant and has resulted in the suppression of the evidence so obtained at trial. *Aguilar v. Texas, supra; Jones v. United States, supra* at 498.[15] Indeed to hold otherwise would negate the force of statutory procedures and render them meaningless. Moreover, the populace should receive the same protection from a search with an invalid warrant regardless of the cause of the invalidity.

In addition to diminishing the force of the procedures enacted by Congress, adoption of the government's argument will undermine important cases such as *Spinelli v. United States,* 393 U.S. 410 (1969), and *Aguilar v. Texas, supra,* among others. In both of these cases, police

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[15]See also, Miller v. United States, 357 U.S. 301 (1958) (breaking into a premises without the statutorily required knock and notice of authority and purpose–evidence suppressed); Distefano v. United States, supra; United States v. Martin, supra. *Compare,* McNabb v. United States, 318 U.S. 332, 345 (1943) (Court will not "stultify" a Congressional command by not enforcing it).

officers made good faith affidavits to the magistrate, and the magistrate issued the requested warrants. However, in both of these cases, there was a "defect in procedure resulting from an error of judgment on the part of the magistrate. . . ." (Res. Br. 54). In both cases, the magistrate did not understand the requisite for probable cause to issue a search warrant, and the Court found the warrants invalid and required suppression of the evidence obtained under color thereof.

In the instant case, the police made a good faith affidavit, and the magistrate erroneously found probable cause for a nighttime execution. Magistrate Margolis' legal mistake[16] is a fundamental error such as was found in *Spinelli* and *Aguilar*. In all three cases, the paper purporting to be a warrant did not in fact give the police the authority to be in the suspect's premises at the actual time of entry.

C. This Court Should Continue To Enforce The Mandate Of *Weeks* That Federal Courts Should Not Permit Unlawfully Seized Evidence To Be Used At Trial.

The government argues in effect that the exclusionary rule is intended only to deter unlawful police conduct. This is clearly not its only Constitutional purpose.[17] This

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[16]This mistake consisted of authorizing service of this warrant at any time of the day or night without the application having shown "exigent circumstances" for execution at night; alternatively, Magistrate Margolis should not have directed nighttime execution without compliance with the provisions of D.C. Code §§521-523 pertaining to nighttime searches.

[17]". . .the *Weeks* rule is of constitutional origin." Mapp v. Ohio, 367 U.S. 643, 649 (1961).

rule compels the courts to avoid further participation in the deprivation of fundamental rights regardless of how inadvertent the initial violation of rights may have been.[18] The citizens of this country have been assured and must continue to be assured that when errors occur in the executive branch and the lowest echelons of the judiciary–which errors result in the issuance of a warrant when no warrant should have issued–the Courts will not permit the furthering of the injury.

This principle was clearly enunciated in *Weeks*:

> "In *Adams v. New York*, 192 U.S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it (*Boyd Case, supra*). To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U.S. at 394.

The *Weeks* Court further made it clear that the Fourth Amendment required the Courts to suppress any evidence which was the fruit of a search with an unlawful warrant:

> "The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, *and to forever secure the people, their persons, houses, papers, and effects,*

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[18]United States v. Calandra, ___U.S.___ (January 8, 1974) (Dissenting opinion of Brennan, J., at 2).

against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and *the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.*

* * * * *

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, *the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.* The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U.S. at 391-2, 393 (emphasis added). *See also, Boyd v. United States,* 116 U.S. 616, 630 (1886).

This principle was recently echoed in *Terry v. Ohio,* 392 U.S. 1, 12-13 (1968), when Chief Justice Warren wrote for the Court:

"The rule also serves another vital function—'the imperative of judicial integrity.' *Elkins v. United States,* 364 U.S. 206, 222 (1960)."[19]

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[19]We note that the majority in Calandra does not mention this vital function of Weeks. Because Calandra involved only the use of illegally seized evidence as a basis for questioning of a witness before a grand jury, there was no challenge to the integrity of trial court proceedings. Thus, we do not believe that Calandra dilutes the importance of the "judicial integrity" aspects of the Weeks rule as applied in instances such as this case.

In *Mapp v. Ohio, supra,* this Court reaffirmed the Constitutional derivation of the *Weeks*[20] rule and asserted that the exclusionary rule was essential to prevent the Fourth Amendment from being "reduced to 'a form of words.' Holmes, J., *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920)." 367 U.S. at 648.

The *Mapp* court wrote:

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.
>
> * * * * *
>
> "Our decision, *founded on reason and truth,* gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." 367 U.S. at 659, 660 (emphasis added).

Notwithstanding the oft-repeated multiple bases for the *Weeks* rule, the government grounds its argument solely on the deterrent theme; that is, the police here went in good faith to a magistrate who erroneously issued a warrant. While there is controversy as to whether the

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[20]Because of its Constitutional base, the exclusionary rule is not merely the product of this Court's supervisory functions (Res. Br. 53). Rather it is required by the Constitution in instances where illegally seized evidence is sought to be introduced in evidence at trial against the victim of the search. While the rule was obviously created by the judiciary, it has far more permanence and stature than a mere rule of evidence established at the discretion of the Court. This rule was established as a protection to the victims of unlawful searches and seizures. Weeks, supra.

exclusionary rule deters unlawful searches,[21] neither of the government's scholarly authorities advocates tampering with the exclusionary rule now. D.H. Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi.L.Rev. 665 (1970); A.G. Amsterdam, *Search, Seizure, and Section 2255,* 112 U.Pa.L.Rev. 378 (1964). (Res. Br. 53-54).

Professor Oaks does conclude from his empirical research that the exclusionary rule as a deterrent is a failure although he does comment that in the District of Columbia the sanction of the rule is not remote in terms of time from the officers who applied for and executed the warrant.[22]

Notwithstanding his empirical findings, he states:

> "The exclusionary rule cannot be replaced as long as it remains a constitutional requirement." (*Id.* at 753)

Indeed, Professor Oaks *does not* advocate tampering with the rule at this time:

> "Despite these weaknesses and disadvantages, the exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions. *If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation.* It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence." (*Id.* at 756, emphasis added).

Thus, any restriction of the exclusionary rule must follow meaningful legislation giving a sure

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[21]See, e.g., United States v. Calandra, supra, slip op. at 9, n. 5.

[22]37 U.Chi.L.Rev. at 688-89.

remedy to the victims of searches performed under the color of a warrant.

Professor Amsterdam also favors retention of the *Weeks* rule in the trial court:

> "I do not mean to revivify here the entire exclusionary rule debate. *Weeks* has long since settled the basic issue in the federal courts—*rightly I believe.*
>
> * * * * *
>
> "... [*Weeks*] sole rational justification is the experience of its indispensability in 'exerting general legal pressures to secure obediance to the Fourth Amendment on the part of federal law-enforcing officers.' As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed [*i.e.* with respect to §2255 motions] than is needed to combat the disease." 112 U. Pa. L. Rev. at 388-89 (citation omitted).

The government cites *United States v. Calandra, supra,* in support of its argument for contraction of the existing coverage of the exclusionary rule. We do not believe that *Calandra* stands for contraction, and it is therefore not applicable to this case.

Mr. Justice Powell, after his discussion of the exclusionary rule, begins Part IV of the opinion by saying:

> "In deciding whether to extend the exclusionary rule to grand jury proceedings. . . ." Slip op. at 11.

Clearly the issue there was whether the *Weeks* rule should be extended to unlawfully obtained evidence used as the basis for questioning of witnesses before a grand jury.

There is nothing in the *Calandra* opinion to suggest that the exclusionary rule will be contracted in its application upon illegally seized evidence used at trial against the person from whom it was seized. Rather Mr. Justice Powell appeared to affirm the rule's continuing validity in situations such as presented here:

> "Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. *Weeks v. United States,* 232 U.S. 383 (1914); *Mapp v. Ohio,* 367 U.S. 643 (1961)." Slip op. at 8-9.

Accordingly, *Calandra* does not support the government's proposition that the *Weeks* rule's present application should be contracted. Because the *Weeks* rule has been applied in the past to suppress evidence which was seized under color of a statutorily defective warrant,[23] no extension of the rule is needed here, and *Weeks* should continue to be applied to this case.[24]

Respectfully submitted,

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[23] See for example, Miller v. United States, supra; Distefano v. United States, supra; compare, Jones v. United States, supra.

[24] This Court has also recognized that the exclusionary rule is essential to maintaining our system of government and liberties. Any relaxation of the rule will necessarily place the rights of citizens on a level lower than the interests or convenience of government officers. This Court should not bow to the transitory unpopularity of the exclusionary rule. As the Court said in Miller v. United States, supra at 313:

> "[I]nsistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness."